Filed 5/11/10 Arthurs v. Rose CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Calaveras)

PAUL ARTHURS, Plaintiff, Cross-defendant and Appellant, v. GARY ROSE et al., Defendants, Cross-complainants and Respondents.	C060509 (Super. Ct. No. CV33605)

Beginning in 2001, Paul Arthurs used dirt roads on the property of Gary and Monika Rose for access to his property. In 2006 and 2007, Arthurs did work on his property causing the number of trucks and heavy equipment using the roads to greatly increase. The Roses found the resulting noise and dust intolerable and the heavy traffic was ruining the roads. Arthurs brought suit to establish a prescriptive easement. The Roses admitted the prescriptive easement, but filed a cross-complaint to limit its scope and to recover damages for

Arthurs's excessive use of the easement. The trial court found a prescriptive easement across portions of Rocky Road and Oak Grove Road on the Roses' property for ingress and egress to Arthurs's property. The judgment, however, limited use of the easement by nonpassenger vehicles, construction vehicles and heavy equipment. It also awarded the Roses damages for deprivation of their right to free enjoyment of their property and for the cost of returning the roads to their condition before Arthurs's overuse. Arthurs appeals, contending the judgment is contrary to the law and the evidence. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 2001, Arthurs moved onto 40 acres of rural property in Calaveras County. He lives in a trailer on the property; there are no improved structures. Arthurs's property is accessed by two dirt and gravel roads, Rocky Road and Oak Grove Road, across the Roses' property. Rocky Road curves around the Roses' house and connects at a left turn to Oak Grove Road. Oak Grove Road runs about 1,000 feet to Arthurs's property. The Roses' driveway is about 100 feet down Oak Grove Road from Rocky Road.

The Roses maintained both Rocky Road and Oak Grove Road. The roads were always substandard; Rocky Road needed the most work because it was a steep incline and rocky. Beginning in 1997, the Roses hired Ron Pargett, who holds an A license for general engineering and road building, to perform maintenance. In 1997, Pargett installed culverts and did ditching. In 2003, he performed work on Rocky Road; afterwards he expected the road

to last five years with normal traffic. In 2006, he did some less substantial work on the roads.

For the first several years Arthurs used the roads about twice a day; there was little heavy vehicle use. In 2006, Arthurs secured a bank loan and cleared a majority of his property. He also lengthened existing roads and put in a new road to the well. The work was mainly clearance and fire protection. This work required dump trucks, brush grinders, water tankers, bulldozers and backhoes. The Roses found the increase in traffic "overwhelming." The traffic of heavy equipment caused significant noise and dust. Arthurs planned to build a house eventually. He expected the work on his property to be "ongoing," with no end in sight. He would not be finished in 10 years; there would be occasional projects "here or there," perhaps new gravel and a backhoe to remove stumps.

Arthurs approached the Roses about obtaining an easement across their property. Negotiations broke down and in April 2007, Arthurs filed suit to establish a prescriptive easement and for an injunction to prevent interference with his use of the easement. The Roses cross-complained for trespass, claiming Arthurs's use of the roads was in excess of the easement. The Roses amended their cross-complaint to add causes of action to quiet title against adverse claims in excess of the easement, for declaratory relief as to the scope of the easement, for damages for nuisance, and for the appointment of an arbitrator pursuant to Civil Code section 845 to apportion costs of maintenance of the easement.

A court trial was held in June 2008. Arthurs presented testimony, by himself and others, that Rocky Road and Oak Grove Road had always been in poor condition, with potholes, poor drainage and no crown, and the roads had not deteriorated due to the heavy equipment travelling on them.

The Roses claimed the heavy equipment caused excessive noise and dust and deteriorated the condition of the roads. They had kept a log of the trips by heavy equipment in 2006 and 2007, and took a video, with sound, and still pictures, all of which were presented to the court as exhibits. In 2006, there were 86 days of noise, about four days a week and every weekend. In spring, summer and fall of 2007, there was heavy use of the roads four days a week and on the weekends. Most of the equipment was taken out in December 2007.

Gary Rose testified the noise was infuriating because it was constant and bombarded him. It was hard to carry on a conversation when the bulldozer went by. Monika Rose testified the noise from the "barrage of vehicles" was terrible and set her teeth on edge. She described the noise as screeching, grinding, rumbling and a "beep, beep, beep" from the heavy equipment. It could be heard inside the house with the windows closed and lasted five to ten minutes each time a truck went by. Sometimes noise from one truck began before noise from the last was gone; the noise kept them inside all summer. The Roses complained the traffic and noise was "not the rural lifestyle, if you can't hear yourself think and if you have to shut your windows in order to survive."

In the summer, the texture of the dust on the roads was fine, like talcum powder. The heavy equipment stirred up the dust to 50 feet. The dust settled everywhere, requiring six to eight hours a week of extra housecleaning. If the house was cleaned Friday night, it would need cleaning again by midday Saturday. The Roses had to pressure wash the house and the screens, which were clogged with dust. They had to keep the windows closed although the house had been designed to take advantage of the air flow.

The heavy equipment also damaged the roads. Bulldozers and other equipment left tracks. According to Pargett, such "cleat track type equipment" would reduce the life of the road "instantaneously." The trench had disappeared and the three-inch crown was gone. The road was widened from 16 to 32 feet, by trucks driving off the road and making S movements.

The Roses requested damages of $100 a day for loss of enjoyment and $25 an hour for the extra cleaning. Pargett testified it would cost $29,150 to bring Rocky Road back to its 2006 condition. The Roses wanted Arthurs to pay 90 percent of this cost. They also wanted to select the contractor because Arthurs hired a contractor without the proper license and some of the workers used marijuana.

At the conclusion of the trial, the court found there was a prescriptive easement for ingress and egress, but not for continual use by heavy equipment. Arthurs was entitled to have heavy equipment use the roads on occasion for maintenance, but not for major improvements in perpetuity. The court found it

was clear the easement had been burdened. Arthurs declined the court's invitation to negotiate the scope of the easement.

The judgment declared a prescriptive easement on Rocky Road and Oak Grove Road for ingress and egress to Arthurs's property. The prescriptive easement allowed travel within seven feet of the middle of each road. Passenger vehicles had reasonable access to the easement and nonpassenger vehicles, such as delivery vans, had reasonable access for seven round trips a week. Construction vehicles and heavy equipment were limited to 10 round trips between May and October between 8:00 a.m. and 5:00 p.m. Monday through Friday. Vehicles with tracks or large tread tires had to be transported by trailer. The size, surface and location of Rocky Road and Oak Grove Road could not be altered without written permission. Arthurs had the right and duty to maintain the easement, with the right to seek contribution from others who used the easement. The Roses had the right to select the contractor and any disputes regarding allocation of maintenance costs were to be submitted to an arbitrator pursuant to Civil Code section 845.

The Roses were awarded $30,935 in damages: $4,700 was for deprivation of the right to free enjoyment of land, calculated at $25 a day for 86 days in 2006 and 102 days in 2007. The remaining $26,235 was for the cost of returning the roads to their previous condition; it was 90 percent of the estimated total cost of $29,150.

DISCUSSION

I.

The Trial Court Did Not Err in Restricting Use of the Prescriptive Easement

Arthurs contends the trial court erred in "micro-managing" his use of the easement. He contends that since he used the prescriptive easement to bring construction vehicles and heavy equipment onto his property as needed during the prescriptive period, that use was established as part of the prescriptive easement.

"The elements necessary to establish a prescriptive easement are well settled. The party claiming such an easement must show use of the property which has been open, notorious, continuous and adverse for an uninterrupted period of five years." (*Warsaw v. Chicago Metallic Ceilings, Inc.* (1984) 35 Cal.3d 564, 570.) The five-year prescriptive period ends on the date the action is filed. (Code Civ. Proc., § 321.)

"The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired." (Civ. Code, § 806.) "The scope of a prescriptive easement is determined by the use through which it is acquired. A person using the land of another for the prescriptive period may acquire the right to continue such use, but does not acquire the right to make other uses of it. [Citations.]" (*Hannah v. Pogue* (1944) 23 Cal.2d 849, 854.)

"The burden of proof is on the party asserting prescriptive rights. [Citations.] It is for the trier of fact to determine

whether the elements of a claimed prescriptive easement have been established [citations] and all conflicts in the evidence must be resolved on appeal in favor of the party who prevailed at trial. [Citations.]" (*Lynch v. Glass* (1975) 44 Cal.App.3d 943, 950.)

The evidence established that Arthurs began using Rocky Road and Oak Grove Road for access to his property in the spring of 2001, when he moved in. Up until the spring of 2006, there was very little use of the roads by heavy equipment or construction trucks.[1] The trial court, crediting the Roses' testimony, determined this increase in heavy equipment and construction trucks on the roads burdened the easement and thus exceeded the existing prescriptive easement.

In *Gaither v. Gaither* (1958) 165 Cal.App.2d 782, the court considered whether an increase in the amount and type of traffic over an easement resulted in a change of the use. Over the necessary prescriptive period, the parties had used a common driveway for ingress and egress to their homes and for farming purposes on their contiguous properties. Subsequently, appellants built a rental unit to the rear of their home and, within two years of the filing of the declaratory relief action, respondent constructed two rental houses. The tenants of both

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[1] Although one of the neighbors, Samuel Cervantes, testified there was heavy equipment traffic ever since Arthurs moved in, he admitted such traffic had tripled in 2006. In rebuttal, Arthurs testified there were "very few" heavy equipment trips on the road attributable to his property until 2006.

parties used the driveway for access to the rental units. When respondent obtained a license to rent parking spaces for 12 house trailers on her property, appellants retaliated by erecting a fence bisecting the driveway on its center line (the boundary line between the parties' properties), and the lawsuit followed. (*Id.* at pp. 783-784.)

The trial court found the driveway had always been used for the residences and rental uses, but the appellate court found no evidence to support the latter use since the rental units had been constructed years later. Nonetheless, the court found the increased burden in connection with the rental units was one of degree only; there was no change in the physical objects passing over the driveway. (*Gaither v. Gaither, supra,* 165 Cal.App.2d at p. 785.) "If the change is not in the kind of use, but merely one of degree imposing no greater burden on the servient estate, the right to use the easement is not affected. [Citations.]" (*Ibid.*)

The *Gaither* court reached a different conclusion as to using the easement for house trailers. "However, the fact the driveway was used for ingress and egress for residential and farming purposes does not necessarily, as a matter of law, show such use was broad enough to give the right to drive house trailers over the driveway, nor to permit the driveway to be burdened with the increased uses which would result from the operation of the trailer park, including the use by the occupants thereof. In such a case there is an actual change in the physical objects passing over the road. Such a change would

be radical, and the driveway cannot be used for the new purpose required by the altered condition of the respondent's property due to the trailer park. Such a use would be a substantial change in the nature of the use and a consequent increase of burden upon the servient estate. It would be something more than a change in the degree of use. [Citation.] In order for this added use to ripen into an easement it would have to exist for the statutory period of five years, or more." (*Gaither v. Gaither, supra,* 165 Cal.App.2d at p. 785.)

Here, it was undisputed that the use of the roads for heavy equipment and construction vehicles had been light for most of the five-year prescriptive period. Thus, Arthurs's use of the roads in 2006 and 2007 for a continuous stream of construction trucks and heavy equipment had not ripened into an easement. It could be argued the increase in heavy equipment traffic was only a change in degree, not kind, since there had been heavy equipment before and the nature of the physical objects passing over the easement did not change. The increase, however, unlike the increased traffic of renters in *Gaither*, did impose an increased burden on the Roses' property; it created noise and dust and damaged the roads.

"The ultimate criterion in determining the scope of a prescriptive easement is that of avoiding increased burdens upon the servient tenement [citation] while allowing some flexibility in the use of the dominant tenement [citation]." (*Pipkin v. Der Torosian* (1973) 35 Cal.App.3d 722, 729.) In *Pipkin*, the court held it was error to define the prescriptive easement

exclusively in terms of agricultural use. Instead, "it should be defined in terms of the right to pass and repass over the same by foot, by automobile, by truck, by tractor and by all types of agricultural equipment, provided that the nature, scope and extent of the use does not substantially increase the burden placed upon the servient tenement as it existed during the period that the prescriptive easement was acquired." (*Id*. at p. 729.) The court noted a radical change in the burden on the servient tenement could occur not only by a change in the use of the dominant tenement, but also "by an increase in the intensity of use." (*Ibid*.)

The scope of an easement may be limited so as to prevent the increased burden of more noise. (See *Connolly v. McDermott* (1984) 162 Cal.App.3d 973, 978 [no error in finding right-of-way for men and horses did not include motorcycles].) Here, the trial court limited the scope of the prescriptive easement to the use established during the prescriptive period, passenger vehicles and occasional larger vehicles. In setting this limit, the trial court balanced the competing concerns of avoiding an increased burden on the Roses' property while allowing Arthurs some flexibility as to the use of his property.

Arthurs contends his increased use of the easement was foreseeable as it was consistent with the natural development of his property. He argues a change of use is permissible if it results from normal evolution in the use of the dominant tenement.

"The applicable principles as set forth in sections 478 and 479 of the Restatement of Property are as follows: Section 478: 'In ascertaining whether a particular use is permissible under an easement created by prescription a comparison must be made between such use and the use by which the easement was created with respect to (a) their physical character, (b) their purpose, (c) the relative burden caused by them upon the servient tenement.' Section 479: 'In ascertaining whether a particular use is permissible under an easement appurtenant created by prescription there must be considered, in addition to the factors enumerated in § 478, the needs which result from a normal evolution in the use of the dominant tenement and the extent to which the satisfaction of those needs increases the burden on the servient tenement.'" (*Hill v. Allan* (1968) 259 Cal.App.2d 470, 484.)

Arthurs failed to show the extent of his use of heavy equipment, which burdened both the easement and the Roses' property, was necessary to clear his property for foreseeable development, such as building a house, or, as discussed further *post*, for fire prevention. The trial court distinguished the use of heavy equipment for a limited purpose, such as building a house, with Arthurs's ongoing land-clearing operation with "no end in sight." Gary Rose testified he did not mind someone working on their property if they complete something, but Arthurs said he would not be done in 10 years.

Arthurs also contends there was no evidence to support the trial court's decision to limit the easement to 14 feet. He is

mistaken. Gary Rose testified Arthurs wanted an easement of 14 feet; the roads varied in width from 12 to 16 feet. Rose claimed the heavy equipment had widened the roads in spots to 22 to 32 feet.

The trial court did not err in limiting use of the easement by nonpassenger vehicles. Such restrictions were supported by evidence of the use of the roads during the prescriptive period and the need to prevent increased burdens to the Roses' property.

II.

The Trial Court Did Not Err in Awarding $4,700 in Damages for Trespass and Nuisance

Arthurs contends the trial court erred in awarding the Roses $4,700 in damages for trespass and nuisance. He contends the damage award was improper because the noise and dust created by the heavy equipment was necessary to comply with brushing and other requirements for fire protection. Arthurs contends the Roses introduced no evidence that Arthurs's use of heavy equipment or the extent of brushing was unreasonable or unnecessary for fire protection work.

"[A]nything which interferes with the free use and enjoyment of property, including such things as dust and noise, may constitute a nuisance." (*Harding v. State of California ex rel. Dept. of Transportation* (1984) 159 Cal.App.3d 359, 362; see also Civ. Code, § 3479 [nuisance includes "[a]nything which is . . . offensive to the senses, or an obstruction to the free use

of property, so as to interfere with the comfortable enjoyment of life or property"].)

The Roses established, to the trier of fact's satisfaction, that the dust and noise created by Arthurs using the roads to transport construction vehicles and heavy equipment on a constant basis was a nuisance that interfered with their comfortable use of their property.

Arthurs seeks to prevail on the affirmative defense provided by Civil Code section 3482, which provides: "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." Arthurs contends his use of heavy equipment was necessary to create defensible space and otherwise provide fire protection as required by Public Resources Code section 4291 and various provisions of the Calaveras County Code. To establish this affirmative defense, Arthurs had to show the scope of his use of heavy equipment was necessary for fire protection. (Evid. Code, § 500; *Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658, 1668 [defendant generally bears burden of proof on affirmative defenses].)

Public Resources Code section 4291, subdivision (a)(1) requires 100 feet of defensible space for structures in forested or brush-covered land. The Calaveras County Code also requires defensible space be maintained. (See Calaveras County Code, § 8.10.360 [requiring 30-foot setback]; § 8.10.380 [requiring maintenance of defensible space].) Arthurs provided no evidence that almost 200 days of heavy equipment use was necessary to

create or maintain the required defensible space or otherwise necessary for mandated fire protection.

The trial court did not err in awarding the Roses $4,700 in damages "for deprivation of [the] right to free enjoyment of land."

III.

The Trial Court Did Not Err in Requiring Arthurs to Pay 90 Percent of the Cost of Road Repair

Arthurs contends the trial court erred in requiring him to pay 90 percent of the estimated cost of repairing the roads. First, he contends the judgment violates Civil Code section 845, which requires owners of a right-of-way easement to share the cost of maintaining the easement.[2] There was evidence other land

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[2] Civil Code section 845 provides in part: "(a) The owner of any easement in the nature of a private right-of-way, or of any land to which any such easement is attached, shall maintain it in repair.

"(b) If the easement is owned by more than one person, or is attached to parcels of land under different ownership, the cost of maintaining it in repair shall be shared by each owner of the easement or the owners of the parcels of land, as the case may be, pursuant to the terms of any agreement entered into by the parties for that purpose. If any owner who is a party to the agreement refuses to perform or fails after demand in writing to pay the owner's proportion of the cost, an action for specific performance or contribution may be brought against that owner in a court of competent jurisdiction by the other owners, either jointly or severally.

"(c) In the absence of an agreement, the cost shall be shared proportionately to the use made of the easement by each owner.

"Any owner of the easement, or any owner of land to which the easement is attached, may apply to any court where the right-of-

owners, including Cervantes, Lopez, and Sandbold, also used the roads to access their property. Arthurs contends these other landowners should have been joined to determine the proportionate share of the repair cost of each.

The Roses respond that Civil Code section 845 is irrelevant to this award of damages. We agree.

Civil Code section 845 provides for the allocation of the cost to "maintain" the easement "in repair." The judgment provided that the dominant estate had the right and duty to maintain the prescriptive easement. It required any disputes as to the allocation of maintenance costs be submitted to arbitration pursuant to Civil Code section 845.

The award of $26,235 was not for maintenance of the easement. Rather, it was damages for Arthurs's overuse of Rocky Road and Oak Grove Road "in a manner that exceeded the then existing prescriptive easement." The $26,235 award constituted damages for trespass and therefore was not governed by the provisions of Civil Code section 845.

Second, Arthurs contends the evidence does not support allocating 90 percent of the repair costs to him because

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way is located and that has jurisdiction over the amount in controversy for the appointment of an impartial arbitrator to apportion the cost. The application may be made before, during, or after performance of the maintenance work. If the arbitration award is not accepted by all of the owners, the court may enter a judgment determining the proportionate liability of each owner. The judgment may be enforced as a money judgment by any party against any other party to the action."

Pargett, the expert, testified the roads were substandard and required repair every five years. Arthurs contends it is "illogical" that he should have to pay 90 percent of the cost of repair due to two years of heavy use when the roads would have soon required repair anyway even with only normal use.

Arthurs's argument is based in part on misconstruing the evidence. Pargett testified he expected his 2003 repairs to last five years with normal traffic. In 2006, he did some "general upkeep."[3] He was surprised how much the roads had deteriorated, calling them "abused." Two years later, at the time of trial, Pargett visited the roads and was again surprised at their deterioration. He testified it would cost $29,150 to bring Rocky Road back to the condition it was in after the 2006 work was completed. Arthurs's argument assumes Pargett's cost estimate would be the cost of routine five-year maintenance and it covers the deterioration since 2003. There is no evidence as to the first point as Pargett did not testify what the cost of routine maintenance would be. The second assumption is incorrect; the estimate was to return the road to its 2006 condition, not to cover deterioration since 2003. Since Arthurs's argument is based on faulty premises, we find it unconvincing. "Perhaps the most fundamental rule of appellate law is that the judgment challenged on appeal is presumed

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[3] Pargett did not indicate when in 2006 he did the general upkeep work. Presumably, it was after Arthurs began transporting heavy equipment on the roads, given Pargett's surprise at their deteriorated condition.

correct, and it is the appellant's burden to affirmatively demonstrate error. [Citation.]" (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.) Arthurs fails to show the trial court erred in ordering him to pay 90 percent of repair costs.

DISPOSITION

The judgment is affirmed. The Roses shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

CANTIL-SAKAUYE, J.

We concur:

BLEASE, Acting P. J.

ROBIE, J.